REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 363 OF 2014

KENYA BREWERIES LIMITED.....APPELLANT

VERSUS

MESHACK MOMANYI OSIEMO.....RESPONDENT

JUDGMENT

1. The respondent in this appeal was the plaintiff in Milimani Chief Magistrate's Civil Suit No. 7484 of 2008. He had sued the appellant *Kenya Breweries Limited* for general damages for pain, suffering and loss of amenities as a result of injuries sustained in an accident which occurred when he was in the appellant's premises working as a casual labourer employed by a sub-contractor engaged by the appellant, *Express 'K' Limited*.

2. In his plaint dated 25th July 2008, the respondent attributed the occurrence of the accident to breach of the terms of his contract of employment with the appellant. He also premised his action on negligence both under common law and under the Occupiers Liability Act. He claimed that while he was engaged in his work, he was a visitor in the appellant's premises and that his injuries resulted from the appellants, its servants or agents negligence and/or breach of the appellant's duty of care under the Occupiers Liability Act. The particulars of the appellant's negligence, breach of contract of employment, statutory and common law duty of care were pleaded in paragraph 7 of the plaint.

3. In its statement of defence dated 23rd February 2009, the appellant denied the respondent's claim in its entirety and put him to strict proof thereof. In the alternative, the appellant averred that if the accident occurred which was denied, it was solely caused or substantially contributed to by the negligence of the plaintiff.

4. After a full trial, the learned trial magistrate, *Hon. D. ole Keiwua* (PM) in his judgment dated 4th July 2014 found the appellant 80% vicariously liable for the respondent's injuries and awarded the respondent a total of KSs.65,440 in special and general damages together with costs of the suit and interest.

5. The appellant was aggrieved by the trial court's decision. It proffered this appeal relying on the following grounds:

i. That the learned magistrate erred in law and in fact by failing to find that on the evidence placed before him, the respondent was an employee of an independent contractor, Express Kenya Limited and not the appellant.

ii. That the learned magistrate erred in law and in fact by failing to find and hold that the appellant cannot in law be held liable for the acts of commission or omission of an independent contractor.

iii. That having found as a fact that the respondent was employed by the independent contractor, the learned magistrate erred in proceeding to find the appellant liable for the acts of the independent contractor's employees.

iv. That the learned magistrate erred in law and in fact by finding the appellant vicariously liable for the acts of the respondent when no employment and/or contractual relationship or at all existed between the appellant and the respondent.

v. That the learned magistrate erred in law and in fact by awarding general damages against the appellant.

vi. That the learned magistrate erred in law and in fact by failing to consider the appellant's submissions before him and relying on irrelevant and extraneous consideration to arrive at a wrong decision.

vii. That the learned magistrate erred in law and in fact in failing to consider the relevant facts and law thus arriving at a wrong decision.

6. The respondent was also dissatisfied with the judgment and decree of the trial court. He filed a notice of cross appeal dated 24th September 2014 in which he made the following complaints:

> *i. That the learned magistrate misdirected himself in the assessment of liability by not holding the appellant 100% liable for the accident.*
>
> *ii. That the learned magistrate misdirected himself on the assessment of quantum on general damages at a figure that was too low in the circumstances.*
>
> *iii. That the learned magistrate erred in law and fact in disregarding the evidence and submissions filed on behalf of the respondent.*

7. When the appeal came up for hearing, the parties agreed to have it prosecuted by way of written submissions. The appellant filed its submissions on 20th March 2018 while the respondent's submissions which were wrongly described as a supplementary record of appeal were filed on 4th June 2018.

8. As the first appellate court, I am fully aware of my duty to revisit and reconsider the evidence adduced before the trial court and arrive at my independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance for that disadvantage. See ***Selle V Associated Motor Boat Company Limited, [1968] EA 123***.

9. I have carefully considered the grounds in the main and cross appeal, the parties' written submissions and all authorities cited. I have also read the evidence on record and the judgment of the learned trial magistrate.

It is my finding that the key issue that arises for my determination in this appeal is whether the trial court erred in its finding on liability against the appellant because the resolution of this issue will determine whether or not the trial court erred in awarding damages to the respondent and the sufficiency or otherwise of those damages.

10. In order to resolve the above issue, it is important to summarise the evidence that was tendered before the trial court. The record of the trial court reveals that the appellant and the respondent called one witness each in support of their respective cases. A medical report authored by *Dr Wangila* dated 1st April 2009 and receipts evidencing payments of the doctor's fees in the sum of KShs.1,800 were produced in evidence by consent of the parties without calling their makers.

11. The respondent who testified as PW1 confirmed in his evidence that at the material time, he was employed as a casual labourer by *Express Kenya Limited* who had been contracted by the appellant to distribute alcohol countrywide. He was employed as a loader and his work together with three other persons was to properly arrange crates of beer in a truck after the same were dropped on the truck by a fork lift. The loading was being done in the appellant's premises. He recalled that while on board the truck arranging the crates containing alcohol, one of the bottles broke and pieces of the bottle injured him in and below the left eye. He was treated at Metropolitan Hospital and *Express Kenya Limited* paid all his bills. On being cross-examined by counsel for the appellant, PW1 admitted that he was injured while inside a truck belonging to Express Kenya Limited.

12. The appellant through DW1 denied any liability on grounds that the respondent was not its employee but an employee of Express Kenya Limited which was an independent contractor.

13. When addressing the issue of liability, the learned trial magistrate stated as follows:

> ***"I find that the plaintiff was working at the material time as a loader for Express Kenya Limited. A contractor contracted by defendant. The plaintiff was hurt in the course of his duty and the benefit of his work was to the defendant reasons to hold defendant liable 80% vicariously."***

14. The trial magistrate correctly found that the respondent was injured while in the course of his employment with *Express Kenya Limited* but proceeded to find the appellant 80% vicariously liable for the respondent's injuries allegedly because it benefited from the work the respondent was doing at the time he was injured.

15. The trial magistrate did not address his mind to the principles that underpin the application of the doctrine of vicarious liability before making his finding. This doctrine only applies in situations where a master and servant or principal and agent relationship has been proved to exist so that the master or principal is held liable for any loss or damage occasioned to a third party as a result of the actions or omissions of his servant or agent as the case may be.

16. In this case, no such relationship was established between the appellant and the respondent. It is not disputed that Express Kenya Limited was an independent contractor meaning that it serviced its contract with the appellant independently and was therefore responsible for its own employees. The principle of vicarious liability did not therefore apply in this case. The learned trial magistrate thus erred in finding the appellant vicariously liable for the respondent's injuries since the respondent was not its employee.

17. Though the respondent emphatically contended in his written submissions that his claim was founded on the *Occupiers Liability Act* as he had been a lawful visitor in the appellant's premises when he was injured, the plaint instituting the suit reveals the complete opposite. It depicts a plaintiff who was either on a fishing expedition or was unsure of his cause of action. To start with, though claiming that he was an employee of Express Kenya Limited, the plaintiff did not enjoin Express Kenya Limited as a party to the suit. He sued only the appellant claiming that it should be held liable as it had allegedly breached the terms of the employment contract between itself and the respondent by failing to ensure a safe and proper system of work.

This leaves no doubt that the respondent was claiming compensation from the appellant as his employer for injuries sustained in the course of his employment while at the same time pitching a claim grounded on negligence under the Occupiers Liability Act - see paragraph 5 of the plaint.

18. I now turn to consider whether the appellant was liable to compensate the respondent for his injuries under the Occupiers Liability Act Chapter 34 of the Laws of Kenya. *Section 3* of the *Occupiers Liability Act* defines the scope of the duty of care an occupier owes to visitors in any premises. The section is in the following terms:

> ***"3 (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.***
>
> ***3 (2) For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."***

19. This provision was interpreted by the Court of Appeal in ***Soma Properties Limited v H A Y M, [2015] eKLR*** where the court stated as follows:

> ***"This provision, imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words "reasonable" and "reasonably" used in the above extract emphasize the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. Thus an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger."***

20. Though I accept the respondent's submissions that the respondent was a lawful visitor to the appellant's premises at the time and that as the owner of the premises the appellant had a responsibility to ensure that the respondent was safe while visiting the premises, the respondent did not adduce any evidence to show or prove that there was anything wrong with the physical state or condition of the appellant's premises that predisposed him to any danger or that the appellant did or failed to do anything that endangered his safety in the premises or that his injury was occasioned by any breach of the appellant's duty of care as the owner of the premises.

21. The evidence on record clearly shows that the respondent was injured while aboard the independent contractor's truck and not in the physical space of the premises. There was no evidence to prove that there was something wrong in the packing or in the chemical composition of the beer that would have caused any of the beer bottles to explode on their own which would have laid a nexus between the breaking of the bottle in question and the appellant.

22. In view of the foregoing, I have no doubt in my mind that the respondent totally failed to prove his claim under the Occupier's Liability Act. It is important to note that though the claim had been clearly pleaded in the plaint, the learned trial magistrate did not address it in any way in his judgment.

23. For the foregoing reasons, I am satisfied that the learned trial magistrate failed to properly interrogate the pleadings and the evidence placed before him and also failed to take into account the legal principles relevant to the respondent's claims and thereby arrived at the wrong decision that the appellant was vicariously liable for the respondent's injuries.

24. My analysis of the pleadings and the evidence before the trial court leads me to the conclusion that the respondent failed to prove that the appellant was in any way responsible for his injuries, that is, either under vicarious liability or under the Occupier's Liability Act. I am thus convinced that the main appeal is merited and it is hereby allowed. I find no merit in the notice of cross-appeal and it is hereby dismissed. The judgment of the trial court is accordingly set aside. It is substituted with a judgment of this court dismissing the respondent's case against the appellant with costs.

25. On costs, I order that each party shall bear its own costs of the appeal and cross-appeal.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 9th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Odhiambo holding brief for Ms Kimaru for the appellant

No appearance for the respondent

Mr. Fidel: Court Assistant